

A **Chin & Sons Sdn Bhd & Ors v**
William Crocket & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–207 OF
1996–III

IAN CHIN J

B 3 FEBRUARY 2000

Land Law — Easement — Extinguishment of — Alternative access available — Absence of owner of land who obtained easement — Whether court has power to extinguish easement — Whether power to determine easement only rests with registrar of land — Sarawak Land Code ss 137(2) & 141

C In October 1952, the registered owner of Lots 30 and 207, Kuching Central Land District, granted an easement over a specified portion of the lands. The layout plan showed that the easement also served Lot 206. The instrument creating the easement was executed before the coming into force of the Sarawak Land Code (‘the Code’) but its registration was maintained and continued under the Code. The first plaintiff acquired Lot 30 in 1989 with an express provision that it was subject to the registered easement. The owner of Lot 206 — who was not a party to this action — had abandoned his right to use the easement. The plaintiffs sought a declaration that the easement ought to be extinguished as the dominant landowners had an alternative access. It was submitted that since the easement was not an indefeasible title because no title was issued but merely an interest in land, the court could extinguish it under ss 137(2) and 141 of the Code.

F **Held**, dismissing the plaintiff’s action:

(1) The absence of the owner of Lot 206 did not prevent the court making the declaration prayed for if the plaintiffs could make out a case for such a declaration (see p 501F–G); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 followed.

G (2) The words of s 137 are clear and they do not deal with the matter of extinguishment of easement at all. Even though s 137(2) does mention the matter of easement, it is in relation to its creation by a grant rather than its extinguishment. Section 141 does not mention the court, let alone conferring it a power to determine or extinguish an easement that is created by a grant. Therefore, neither s 137 nor s 141 is of any assistance to the plaintiffs’ proposition of law that they confer upon the court the power to determine or extinguish the easement. Therefore, the court has no power to wipe out the record of the easement in the register which the plaintiffs urged the court to do; such power is conferred expressly on the registrar by s 141 of the Code (see p 506C, G–I).

I (3) The plaintiffs may, if not barred by other legal consideration, apply to the registrar under s 141 to have the easement

extinguished on the basis of an incorporation of an implied term that the easement comes to an end where there is alternative access (see p 509E–F).

[Bahasa Malaysia summary]

Pada Oktober 1952, tuan punya berdaftar Lot-lot 30 dan 207, Kawasan Pusat Tanah Kuching, telah memberikan easement ke atas bahagian tanah-tanah yang ditetapkan. Pelan susun atur tersebut menunjukkan bahawa easement juga termasuk Lot 206. Instrumen mewujudkan easement telah dilaksanakan sebelum berkuatkuasanya Kanun Tanah Sarawak ('Kanun tersebut') tetapi pendaftarannya telah dikekalkan dan disambung di bawah Kanun tersebut. Plaintif pertama telah memperolehi Lot 30 pada tahun 1989 dengan peruntukan jelas bahawa ia adalah tertakluk kepada easement berdaftar. Pemilik Lot 206 — yang bukan pihak kepada tindakan ini — telah melepaskan haknya untuk menggunakan easement tersebut. Plaintif-plaintif telah memohon suatu deklarasi bahawa easement tersebut patut dihapuskan oleh kerana tuan punya tanah dominan mempunyai laluan alternatif. Adalah dihujahkan bahawa oleh kerana easement bukanlah hak milik yang tidak boleh disangka kerana tiada hak milik dikeluarkan tetapi hanyalah kepentingan di atas tanah, mahkamah boleh menghapuskannya di bawah ss 137(2) dan 141 Kanun tersebut.

Diputuskan, menolak tindakan plaintif:

- (1) Ketiadaan tuan punya Lot 206 tidak menghalang mahkamah daripada memberikan deklarasi yang dipohon jika plaintif-plaintif boleh membuktikan suatu kes untuk deklarasi tersebut (lihat ms 501F–G); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 diikuti.
- (2) Perkataan s 137 adalah jelas dan ia tidak berkaitan langsung dengan perkara penghapusan easement tersebut. Walaupun s 137(2) menyatakan perkara easement berkenaan, ia adalah berkaitan dengan pewujudannya melalui geran daripada penghapusannya. Seksyen 141 tidak menyatakan mahkamah dan lebih-lebih lagi memberikannya kuasa untuk menamatkan atau menghapuskan suatu easement yang diwujudkan oleh suatu geran. Oleh itu, ss 137 dan 141 tidak dapat membantu hujahan undang-undang plaintif-plaintif bahawa ia memberikan mahkamah kuasa untuk menamatkan atau menghapuskan easement tersebut. Oleh itu, mahkamah tiada kuasa untuk melenyapkan rekod easement tersebut di dalam daftarai di mana plaintif-plaintif telah memohon mahkamah untuk berbuat demikian; kuasa sedemikian diberikan secara nyata ke atas pendaftar melalui s 141 Kanun tersebut (lihat ms 506C, G–I).
- (3) Plaintif-plaintif boleh, jika tidak dihalang oleh pertimbangan undang-undang yang lain, memohon kepada pendaftar di bawah

- A** s 141 agar easement dihapuskan di atas dasar kemasukan suatu terma tersirat bahawa suatu easement berakhir apabila terdapat laluan alternatif (lihat ms 509E–F).]

Notes

- B** For cases on easement generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2005–2053.

Cases referred to

- C** *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (folld)
Gouriet v Union of Post Office Workers [1978] AC 435 (refd)

Legislation referred to

- D** Rules of the High Court 1980 O 32 r 1, O 33 rr 2, 5
Sarawak Land Ordinance s 13
Sarawak Land Code ss 137, (1), (2), (3), 141
Benedict HK Lim (Tiong Lim Wong & Co) for the plaintiffs.
Wendel Crocker (Dominic Lai & Co) for the first defendant.
- E** *Francis Wee (Si & Wee)* for the second defendant.
Susan Gau (Attorney General Chambers) for the third defendant.

Cur Adv Vult

Ian Chin J:

- F** *Introduction*

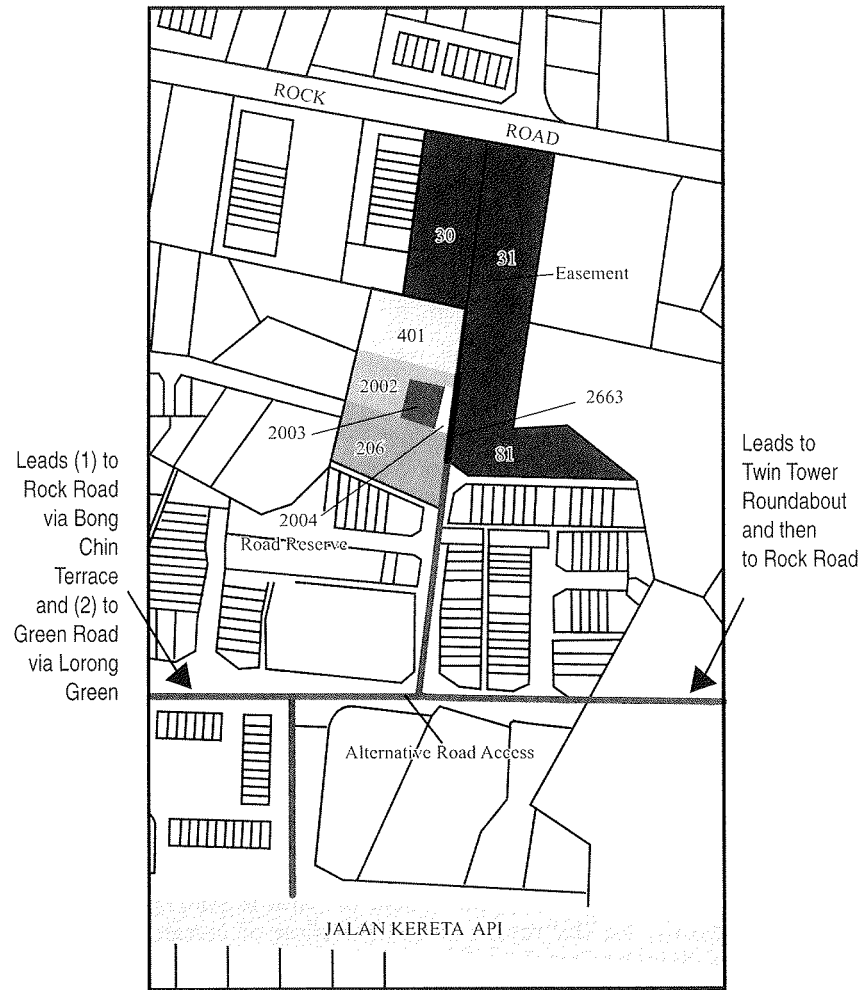
By this action the plaintiffs (Chin & Sons (1955) Sdn Bhd ('first plaintiff'), Chin Shen Syn ('second plaintiff') and William Chin ('third plaintiff') seek a declaration that an easement (right of way) that was created over part of Lot 30, Block 10, Kuching Central Land District, which the first plaintiff owns, ought to be extinguished as the dominant land owners William Crocket @ William Crocker ('first defendant') and Yu Lee Hong Motors Sdn Bhd ('second defendant') have an alternative access to public roads. Another claim concerns the Superintendent of Land & Survey Department ('third defendant'), for the return or re-alienation of certain land to the plaintiffs if the claim against the other two defendants should fail.

- H**

Facts of case

- I** The dominant properties are Lot 401, owned by the second defendant Yu Lee Hong Motors Sdn Bhd, Lot 2002, owned by the first defendant, Lot 2003 owned by a Andrew Dexter Chia who is not a party to this action but who had given up his right to the easement and Lot 206 owned by an unknown owner and who is also not a party to this action. As for the owner of Lot 206, he had also given up his right, the extent of which will be

discussed later, to use the easement. The servient property which the first plaintiff owns is Lot 30. The first plaintiff also owns a parcel of land known as Lot 31 which is contiguous to Lot 30 but separated from it by the easement. The various locations of these properties are best shown by the following plan:



This plan is a reproduction by me of a plan admitted as evidence and the details are culled from the plans and evidence in the case. A copy of this plan was during the closing speeches shown to learned counsel for all the parties and they agreed that the plan accurately represents the facts. The numbers there refer to the lot numbers of the land which I have earlier mentioned. The easement is represented by a red line. Lot 2004, in turquoise, is a road reserve. Lot 2663 in black is a tarred road. It was

- A** formerly part of Lot 81 but was surrendered to the government following a subdivision of Lot 81. The plaintiffs are claiming against the third defendant, the superintendent of land and survey department, for a re-alienation of Lot 2663 back to the plaintiffs if their claim against the first defendant and second defendant should fail. The two main roads, Rock Road and Jalan Kereta Api, are in yellow while the feeder roads providing alternative access to Lots 2002 and 401 are indicated in brown.

Lots 401, 2002, 2003 and 2004 were formerly comprised in one lot known as Lot 207. At one time Lot 207 and Lot 30 were owned by one person who had granted the said easement by an instrument which is worded in the following terms:

- C** Easement (Right Of Way)
Kuching Central Land District, Block 10, Lot 30 and 207
I, Greenslade, Phyllis Dorothy ... registered owner of ... Lots 30 and 207 do hereby agree to the registration of a right of way over that portion of the said lands as shown coloured red in the sketch on the reverse hereof.
- D** AND this right of way shall be registered as a servient easement on Lot 39 ... and Lot 207.

Dated this 18 October 1952.

[Signed etc ...]

Registered at Kuching this 18 November 1952.

- E** The reverse side of this document contains a layout plan of the easement. This plan shows and it is common ground that the easement also served Lot 206. It was upon this instrument and its registration that the first defendant and second defendant claimed a right to the easement. There is no dispute thus far. In so far as the case concerns the first defendant and second defendant, nothing much turns on the oral testimony and almost all the evidence relate to the matters which are shown in the plan, *supra*, which should not be matters of any controversy.

Owner of Lot 206 not a party

- G** The first issue revolves around the absence of the owner of Lot 206 from the present proceedings which the defendants contend prevent the court making the declaration concerning the easement. The plaintiffs are seeking to extinguish the easement and expunge it from the titles which would affect the owner of Lot 206. As mentioned earlier, the previous owner of Lot 206 had on 8 December 1984 executed the following instrument in relation to the easement, *viz*:

- H** Memorandum of Transfer
(Extinguishment of Right of Way by Express Release)
(Section 141 of the Land Code Cap 81)

- I** I, Liew Yu Tshiung ... , being registered as the proprietor of that parcel of land described as Lot 206 ... which is the dominant tenement of an easement of right of way over the land hereinafter described In consideration of one peppercorn paid to me (the receipt whereof we hereby acknowledge) by Molly Ling Nguok Chuo ... And William Crocket ... being registered as

co-proprietors each holding one-half ($\frac{1}{2}$) undivided share of that parcel of land described as Lot 400 Block 10 Kuching Central Land District which is the servient tenement of the said easement of Right of Way Do Hereby Transfer And Release to the transferees ALL the right of way over the land described as Lot 400 Block 10 Kuching Central Land District created in and by Memorandum of Grant of Right of Way No L 1222/1952 registered at the Kuching Land Registry Office on the 18 November 1952, to THE INTENT that such right shall henceforth cease and determine.

Dated this 8th December 1984.

[Etc ...]

By that instrument the owner of Lot 206 gave up his right to use the easement, at least the part that runs across Lot 400 from which, it will be recalled, Lots 2002, 2003 and 2004 were derived. What about that part of the easement which is further up and that runs over Lot 30? Could the owner of Lot 206 be regarded as having abandoned that as well? If the owner of Lot 206 cannot pass over Lot 400, on which land part of the easement is situated and which he gave up his right to use, he would not be able to have access to the easement on Lot 30. By implication he could be regarded as having also given up the right to use the easement over Lot 30. However, in the place of the easement over Lot 400, there exists a road reserve constituted in Lot 2004 which was created on 10 December 1984 which is two days after the owner of Lot 206 had given up his right. This owner can still access the easement over Lot 30 by going through this road reserve. However, there is no evidence that this owner had this road reserve in mind when he gave up his right. If there is such evidence, then it can be argued that he had reserved the right to continue to use the easement over Lot 30 by way of the road reserve. In its absence, I can safely conclude that the owner of Lot 206 can be regarded as also having given up his right to use the easement over Lot 30. But the owner of Lot 206 was not brought to court by the plaintiffs and this was the foundation of the argument of the first defendant that the court cannot make any declaration concerning the easement in the absence of the owner of Lot 206. This brings to mind the case of *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (FC). In that case the respondents were elected members of the Kelantan State Legislative Assembly at a general election but resigned from the party on whose ticket they stood and won the election. They joined another party. Consequently the Kelantan State Legislative Assembly passed a resolution that the respondents had ceased to be members of the legislative assembly and their seats were declared vacant. A by-election was held, the respondents stood for election again but were defeated. One Haji Samat and one Haji Mahmud were the successful candidates elected in their place. Subsequently the respondents obtained from the High Court a declaration that art XXXIA of the Kelantan Constitution was invalid, null and void. Haji Samat, Haji Mahmud and the Election Commission were not made parties to the proceedings though they were directly affected. It was contended that they have thereby been denied the opportunity of being heard resulting in a breach of the rules of natural justice. The Federal Court held at pp 700-701, among others:

- A** (a) Although neither Haji Samat nor Haji Mahmud, being the persons interested in the subject matter of the declarations sought, were made parties to the proceedings in the High Court, the learned judge was not prevented from making the declarations prayed for, having regard to the very exceptional circumstances in this case. Even though there was no attempt by Haji Samat or Haji Mahmud to be made a party to the proceedings, nevertheless it could be said that the State Legislative Assembly of Kelantan was, in reality, fighting the suit on behalf of them.
- B**
- C** (b) In the particular circumstances of the case, there were ample grounds to invoke the doctrine of substantive fairness the effect of which is that natural justice may impinge upon the substance of a decision. After considering the merits of the case it has been clearly demonstrated that even if Haji Samat and Haji Mahmud had been made parties to the proceedings in the court below, the result of the litigation would have been the same so that it could not be said that there was a real likelihood of their having suffered any prejudice. It follows that their non-joinder is a matter which should be condoned in the exercise of the court's discretion.
- D** In the present case, the owner of Lot 206 has long ago abandoned his right to use the easement as can be gathered from what I have said earlier. That it was abandoned is also supported by the fact that when in September 1994 the plaintiffs caused the easement to be obstructed and though the first defendant and second defendant complained to the police and the land & survey department, the owner of Lot 206 did not. He also did not attend the enquiry that ensued. All these show that the owner is no longer using the easement and is not concerned with what happened to the easement as there is an alternative access. If there is an alternative access, the issue remaining would be matters of law for which the presence or absence of the owner of Lot 206 would make no difference. Therefore, applying *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*, I am of the view that given the circumstances of this case that the absence of the owner of Lot 206 does not prevent the court making the declaration pray for if the plaintiffs can make out a case for such a declaration. This leads me to consider how an easement can be extinguished which is the major area of contention.
- E**
- F**

G

Extinguishing easement

- The terms 'easement' and 'right of way' had been used by the instrument creating the same. That instrument was executed in 1952 before the coming into force of the Sarawak Land Code but its registration was maintained and continued under the Land Code. The first plaintiff acquired Lot 30 in 1989 with an express provision that it is subject to the registered easement. The first plaintiff's estate or interest in Lot 30 is under s 132(1)(f), subject to the easement.
- H**

- The terms 'easement' or 'right of way' are not defined in the Land Code nor by its predecessor the Land Ordinance. It is common ground that a right of way is a form of easement. The meaning of 'right of way' can be gathered from s 13 of the Land Ordinance which has employed the term, viz:
- I**

- (1) All land shall be held subject to an implied right of way for owners or occupiers of land adjoining or in the neighbourhood to go to and from their land over Crown land or over land of adjoining owners, if there is no other reasonable means of ingress and egress, and also a right of way, if necessary, for carts or other vehicles to pass and re-pass for all reasonable purposes. **A**
- (2) If the owners concerned cannot agree among themselves to the location of the path or tract which will constitute a right of way the matter shall be referred to the Superintendent by the person or persons requiring the right of way, and if the right of way is agreed upon or granted by the Superintendent and dedicated as a public or private right of way, the right of way so dedicated shall where possible be referred to or delineated in all the grants or other documents of title affected by the right of way and noted accordingly in the Land Office. **B**
- (3) The right to claim a right of way can only be resorted to by owners or occupiers of land who have no other reasonable means of ingress and egress other than over the land of adjoining owners, and primarily to and from a public road or way, river, creek or foreshore. **C**
- (4) Compensation for damage, if any, to trees or other property belonging to the person or persons through whose land a right of way is made, shall be primarily assessed by and between the parties concerned and in the absence of agreement shall be referred to and assessed by the Superintendent. **D**

Since the instrument must have been the result of negotiations against the background of the Land Ordinance I can suppose that they have taken that law into consideration when the instrument was created (*Lewison on Interpretation of Contracts* at p 56, para 3.04). Thus, it is clear to me that when the instrument was created it was meant to grant a right of way as envisaged by s 13 of the Land Ordinance. That right of way was granted because the dominant properties were landlocked. By that consideration alone, the instrument can be taken to exist for as long as there is no alternative access. However, it is open to the parties to grant a right of way in perpetuity and this is recognised by Form G(1) of the Land Code. This brings me to the question of whether the easement was intended for perpetuity or till an alternative access comes into existence. For this purpose it is the instrument that we should look at primarily to find the answer and to construe it against the legal background then existing. Unfortunately, the instrument is completely silent as to the duration of the right of way. However, since the matter of the right of way was covered by s 13 of the Land Ordinance it is relevant to take that law into account. It is clear from that provision that the then owner of Lot 30 had no option but to allow the owners of Lots 207 and 206 to pass and repass Lot 30 since it is subject to that implied right of neighbouring land-locked owners given under the Land Ordinance. Since the instrument did not express the right of way to be forever it is inconceivable that the owner of Lot 30 would have intended it to be so when the Land Ordinance only requires an obligation to provide the right of way when there is no alternative access. It is only possible where there is valuable consideration or where it is granted for love and affection but there is no evidence of that. Unfortunately, there is also no term in the

- A** instrument to say that the right of way shall cease when there is other means of ingress or egress. It is also not the case of the plaintiffs that there should be a term implied in the instrument that the right of way shall cease and be extinguished upon the coming into existence of an alternative access. If the case had proceeded on that basis that such term should be implied in the instrument, I would, on the existing evidence, find it difficult not to accede to such argument. I have to leave matter as it is since the case was not argued on that line.
- B**

Dr Benedict Lim, learned counsel for the plaintiffs, argued that since the right of way or easement is not an indefeasible title because no title was issued but merely an interest in land, the court can extinguish or modify it under ss 137(2) and 141 of the Land Code. His authority for such proposition is the unreported decision of Steve Shim J which came as a result of an application by the first defendant by summons in chambers taken out in this action, under O 32 r 1 and O 33 rr 2 and 5 of the RHC 1980, for 'an order that the following issues be tried as preliminary issues':

- D**
- (1) Whether upon construction of s 137(2) and s 141 of the Land Code, the first plaintiff is entitled to extinguish the registered easement of the first defendant .
 - (2) Whether upon construction of s 131 and s 132(f) of the Land Code, the registered easement of the first defendant can be extinguished by the first plaintiff through the declaration of this Honourable Court.
- E** The learned judge in his judgment dated 7 August 1997 did not make the orders for the matters to be tried as preliminary issues. In the course of his judgment, ss 131, 132(F), 137(2), 141 and 183 were mentioned. Then he concluded his judgment in these words:

- F** Undoubtedly, the rule [O 15 r 16 of the RHC 1980] confers an inherent jurisdiction on the court to grant declaratory judgments or orders. And it is within the ambit of that inherent jurisdiction that the first plaintiff has sought redress in this court. In my view, he is perfectly entitled to do so.

- G** For all the reasons given, this court therefore has the power and jurisdiction to make an order of determination or extinguishment of the easement No L1222/1952 upon the first plaintiff's application on merits. The application has yet to be heard. Cost of this application be given to the plaintiff.

- H** It will be remembered that the court there was only concerned with whether to have a trial of the preliminary issues and nothing else. Therefore, whatever was said cannot be binding regarding the issues at hand. It remains to be decided whether ss 137(2) and 141 of the Land Code confer upon the court the power to extinguish the easement as contended by Dr Lim. Section 137 is in these words:

Transfers

- I**
- (1) When any land or any estate or interest therein is intended to be transferred, the transferor and transferee shall execute for the purpose of registration a memorandum of transfer in Form G in the First Schedule, which memorandum shall give such description of the land as may be necessary, shall refer to the entry in the Register relating thereto and shall

contain a precise statement of the estate or interest intended to be transferred. Every transfer shall be subject to the provisions of section 31.

- (2) A right of way or other easement over or affecting any land may be created by a grant in Form G(1) in the First Schedule modified to suit the circumstances, and may be made appurtenant to other land, but no such right of way or other easement in respect of land subject to a charge shall be binding on the chargee, except so far as he has consented thereto.
- (3) Upon any lawful transfer of part of the land comprised in any existing document of title, a new document of title shall be issued for the part transferred and another document of title shall be issued for the balance, pursuant to section 25.

The words of s 137 are clear and they do not deal with the matter of extinguishment of easement at all. Even though s 137(2) does mention the matter of easement it is in relation to its creation by a grant rather than its extinguishment. Form G(1), mentioned there, was introduced in 1994 and it provided for a format where more particulars of an easement granted by agreement of the parties can be given and registered and these include detail as to the duration of the easement, that is whether for a fixed period or for perpetuity, and the terms of the grant of the easement. Thus if the easement has been for a fixed period, the date of expiry would be mentioned in Form G(1). When an easement has expired in accordance with the terms of the grant as stated in Form G(1), s 141, which is another section mentioned by learned counsel, would come into play to enable the registrar to record the termination of such an easement by effluxion of time. Section 141 is in the following term:

Where an easement has been determined or extinguished, the registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto:

Provided that, unless the determination or extinguishment was by effluxion of time or merger, the registrar before making the entry in the Register shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the Gazette.

In cases other than effluxion of time or merger of the titles, the registrar, under s 141, could not simply make an entry to record a determination or effluxion of time. The registrar must before doing so give a month's notice in the gazette of his intention to do so to the persons entitled to the interest. Here again, the section does not mention the court let alone conferring it a power to determine or extinguish an easement that is created by a grant. Therefore, neither ss 137 nor 141 is of any assistance to learned counsel's proposition of law that they confer upon the court the power to determine or extinguish the easement. Therefore, the court has no power to wipe out the record of the easement in the register which the plaintiffs urged the court to do; such power is conferred expressly on the registrar by s 141 of the Land Code.

However, that does not mean that the court does not have a power to make a declaration on the legal position of the parties or as regards the

A easement. That it has that general power is made clear by O 15 r 16 of the RHC 1980 where it lays down that the court may make binding declarations of right whether or not consequential relief is or could be claimed. Wide it may be that power to make declarations, I am of the view that it is still subject to various limitations and I need only remind myself of one such, viz:

B But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else (*Gouriet v Union of Post Office Workers* [1978] AC 435 at p 501G).

C That case has to be read subject to the decision in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*.

In coming to the conclusions I have made, I have considered the various other arguments put forth by learned counsel for the defendants. Ms Susan Gau, learned counsel for the third defendant, in so far as the interpretation of the various provisions is concerned had urged an interpretation which I had agreed. Learned counsel had additionally submitted, and which I also agree, that the registrar, the officer designated under the Land Code and which the third defendant is one, has a role to construe the grant and give it its effect. I would add that the court also has that power to do so.

E Mr Wendel Crocker, learned counsel for the first defendant, argued that the first defendant by virtue of his ownership of Lot 2002 is guaranteed the title or right to the easement under s 131 of the Land Code. There is no dispute that there should be no derogation of the title or interest of the first defendant and that the first plaintiff holds Lot 30 but to the easement as provided under s 132(1) of the Land Code. But that right to the easement, since it is a private grant, would depend on the terms of the grant.

F Therefore, I am unable to agree with the proposition of Mr Wendel that all easement granted privately will remain in perpetuity and cannot be extinguished except upon prove of fraud. If the grant says it is to end tomorrow, it would so end irrespective of ss 131 and 132. Section 141 already provides for removal where the easement had expired or where the lands had merged. Therefore, if the grant is for a limited period the

G easement will end and ss 131 and 132 would have no relevance. The matter at hand turns on the interpretation of the grant and not on ss 131 or 132.

H Mr Francis Wee, learned counsel for the second defendant, apart from adopting what Ms Gau had said relating to the legal provisions had also argued that the plaintiffs had not come with clean hands and so are disentitled to the equitable declaratory relief. Mr Wee had pointed out various part of the evidence of a director of the first plaintiff which he submitted are untruths and also to the selfish intention in wanting the easement extinguished. All these I have considered and I do not think they should stand in the way of my making the declarations if they can be made at all. As for the alternative access being not as convenient as the easement,

I the second defendant had admitted that the easement cannot be used by heavy vehicles and these vehicles used alternative access to get to Lot 401. Therefore, the other access is definitely better than the access provided by

the easement since the other access permits the use of all vehicles, heavy and light, as opposed to light vehicles only if the easement is used. In any event, the law talks of 'other means of access' not a better means of access or quicker access or shorter access.

A

It does not matter that the other arguments of the first defendant and second defendant had failed because, for the reasons I have already stated, the plaintiffs cannot obtain the declarations.

B

This leaves the final issue of the claim against the third defendant which is based on an alleged understanding or promise given by the third defendant.

Understanding given or promise made

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The plaintiffs had through Alan Chin testified that there was an oral understanding with the third defendant and confirmed by correspondence between the third defendant and his solicitors that upon the surrender of Lot 2663 by the second plaintiff and third plaintiff for the purpose of an alternative access, the third defendant would extinguish the easement. When asked when the 'understanding' was given, he said it was some time in 1994 though he could not tell which part of the year. He said it was given when he met the third defendant in his office and at that time he brought along a lawyer named Lila Tan of M/s Tan & Lai. This lawyer though she wrote to the third defendant after the alleged meeting never once mention this alleged meeting or the 'understanding'. He could not explain why there was not even a whisper of this 'understanding'. The lawyer was also not called to testify to support this oral 'understanding'. On 3 August 1994, this law firm had, on behalf of the first plaintiff, applied to the third defendant for the extinguishment of the easement. The third defendant, though not in reply to that letter, had by a letter dated 14 September 1994 said it would consider the application after which the third defendant gave notice of an enquiry which he intends to hold 'in accordance' with s 34 of the Land Code and in relation to the right of way on 20 September. Minutes of this enquiry was not produced but it was not in dispute that the enquiry resulted in the plaintiffs being ordered to remove any obstruction of the easement. The law firm then on 10 October wrote to the third defendant to propose the surrender of Lot 2663 which they had already sealed in exchange for the extinguishment of the easement. This was rejected by the third defendant though a subdivision of Lot 81 into two lots, Lot 2663 and Lot 2662, was approved. Lot 2663 was surrendered to the government as a road reserve. The plaintiffs accepted the subdivision and did not thereafter pursue the matter of the extinguishment of the easement until the present action which was taken out in 1996. As against those evidence the third defendant testified that he had never given any understanding or promise that the easement would be extinguished upon the surrender of Lot 2663. The third defendant, who had been with the Land and Survey Department since 1978, explained that he could not have given that understanding or promise because it was not within his power to extinguish a private grant of the easement. I am inclined to believe the third defendant that he did not give

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A any such understanding or promise. If there was, Lila Tan could easily have corroborated it since any lawyer worth his salt would record what went on during the alleged meeting with the third defendant and take the first opportunity which avails to put the matter on record. This is even more necessary, as event turns out, when Alan Chin cannot even remember the date or month this meeting took place. In my view, an adverse presumption

B can be drawn in the failure of the plaintiffs to call Lila Tan. What is even more unbelievable is that there is not even a single mention of this understanding or promise though there were a number of letters emanating from the law firm of Lila Tan subsequent to this alleged meeting. The absence belies the allegation of Alan Chin. The documentary evidence is always preferable. In this regard, the documents show that the surrender of

C Lot 2663 was in consideration of the subdivision of Lot 80. Thus, I do not see how the plaintiffs can argue that the surrender was in consideration of the extinguishment of the easement. Therefore, the claim against the third defendant is completely groundless.

D *Conclusions*

In the premises the plaintiffs' action is dismissed with costs to all the defendants. The first defendant and second defendant shall get only half the costs because a lot of time was wasted by insisting on the adducing of evidence with regards to the matters I have set out in the plan, which are

E plainly indisputable and with regards to the obstruction of the easement which was already resolved and of no relevance to the present proceedings. The third defendant will get his costs in full. The plaintiffs may, if not barred by other legal consideration, still have a way out and that is by applying to the registrar under s 141 to have the easement extinguished on the basis of an incorporation of an implied term that the easement comes to

F an end where there is alternative access. This matter I have not decided since it was not canvassed before me and it would be up to the registrar to decide whether it can succeed if ever the matter can legally be laid before him again.

Plaintiff's action dismissed.

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Reported by Jafisah Jaafar

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